


ORIGINAL

FILED
07 OCT 31 AM 9:00
CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY
BY: 

1 Lawrence H. Meuers
2 (SBN: 197663)
3 Steven E. Nurenberg
4 FL Bar No. 0808431
5 Steven M. De Falco
6 FL Bar No. 0733571
7 MEUERS LAW FIRM, P.L.
8 5395 Park Central Court
9 Naples, Florida 34109
10 Telephone: (239) 513-9191
11 Facsimile: (239) 513-9677
12 lmeuers@meuerslawfirm.com
13 snurenberg@meuerslawfirm.com
14 sdefalco@meuerslawfirm.com

15 Attorneys for Plaintiff

16 **UNITED STATES DISTRICT COURT**
17 **SOUTHERN DISTRICT OF CALIFORNIA**
18 **SAN DIEGO DIVISION**

19 **FORTUNE GROWERS, LLC, a**
20 **Nevada limited liability company,**

21 **Plaintiff,**

22 **vs.**

23 **SOUTHERN CITRUS, INC., a**
24 **California corporation; HANA GIBO,**
25 **an individual; and SABAH**
26 **YOUKHANNA, an individual,**

27 **Defendants.**

07 CV 2088
Case No.: _____

JAH CAB

**PLAINTIFF'S MEMORANDUM
OF POINTS AND
AUTHORITIES IN SUPPORT OF
EX-PARTE MOTION FOR
TEMPORARY RESTRAINING
ORDER AND MOTION FOR
PRELIMINARY INJUNCTION**

28 Plaintiff, Fortune Growers, LLC ("Fortune Growers") submits its
Memorandum of Points and Authorities in support of an Ex-Parte Motion for
Temporary Restraining Order pursuant to Fed. R. Civ. P. 65(b), and its Motion

1 for Preliminary Injunction pursuant to Rule 65(a). Submitted in support of
2 Plaintiff's Motion are the Certification of applicant's attorney as to why notice is
3 not required and the sworn Affidavit of Luis Solarte, Managing Member of
4 Fortune Growers.
5

6 INTRODUCTION

7 Plaintiff is engaged in the business of buying and selling wholesale
8 quantities of perishable agricultural commodities ("Produce") in interstate
9 commerce.
10

11 Defendant Southern Citrus, Inc. ("Southern Citrus"), upon information
12 and belief, is a California corporation with its principal place of business in
13 Chula Vista, California and is and was at all times pertinent herein, a dealer and
14 commission merchant and subject to the provisions of the Perishable
15 Agricultural Commodities Act ("PACA").
16
17

18 Plaintiff seeks enforcement of the statutory trust established under the
19 PACA, 7 U.S.C. §499e(c), and the regulations issued pursuant thereto, 7 C.F.R.
20 Part 46, 49 Fed. Reg. 45735 (Nov. 20, 1984). The Court's jurisdiction is invoked
21 pursuant to 7 U.S.C. §499e(c)(5).
22

23 THE PACA TRUST

24 PACA was enacted in 1930 to "suppress unfair and fraudulent practices in
25 the marketing of fruits and vegetables in interstate and foreign commerce" and
26
27

1 "provides a code of fair play . . . and aid to [agricultural] traders in enforcing
2 their contracts." 49 Fed. Reg at 45737.

3 In 1984, PACA was amended to assure that suppliers of Produce are paid
4 by imposing a statutory trust on all Produce-related assets, such as the Produce
5 itself or other products derived therefrom, as well as any receivables or
6 proceeds from the sale thereof, held by agricultural merchants, dealers and
7 brokers. 7 U.S.C. §499e(c)(2). Tanimura & Antle, Inc. v. Packed Fresh Produce,
8 Inc., 222 F. 3d 132 (3rd Cir. 2000). The trust must be maintained for the benefit of
9 the unpaid suppliers, sellers or agents who provided the commodities until full
10 payment has been made. Id. The trust provision thus offers sellers of Produce,
11 "a self-help tool that will enable them to protect themselves against the
12 abnormal risk of losses resulting from slow-pay and no-pay practices by buyers
13 or receivers of fruits and vegetables." 49 Fed. Reg. at 45737.

14 Failure to maintain the trust and make full payment promptly to the trust
15 beneficiary is unlawful. 7 U.S.C. §499b(4). Produce dealers "are required to
16 maintain trust assets in a manner that such assets are freely available to satisfy
17 outstanding obligations to sellers of perishable agricultural commodities[.]" and
18 any act or omission inconsistent with this responsibility, including dissipation of
19 trust assets, is proscribed. 7 C.F.R. §46.46(e)(1). Dissipation of trust assets,
20 defined as the diversion of trust assets or the impairment of a seller's right to
21

1 obtain payment (7 C.F.R. §46.46(b)(2)), is forbidden. 7 C.F.R. §46.46(e)(i).

2 **ENTITLEMENT TO TEMPORARY**
3 **RESTRAINING ORDER WITHOUT NOTICE**

4 Rule 65(b) of the Federal Rules of Civil Procedure sets forth the standard
5 under which a Temporary Restraining Order may be issued without notice:
6

7 A temporary restraining order may be granted without
8 written or oral notice to the adverse party or that party's
9 attorney only if (1) it clearly appears from specific facts
10 shown by Declaration or by the verified complaint that
11 immediate and irreparable injury, loss, or damage will
12 result to the applicant before the adverse party or that
13 party's attorney can be heard in opposition, and (2) the
14 applicant's attorney certifies to the court in writing the
15 efforts, if any, which have been made to give the notice
16 and the reasons supporting the claim that notice should
17 not be required.

18 In seeking relief pursuant to Rule 65 of the Federal Rules of Civil
19 Procedure, Plaintiff relies exclusively upon the Affidavit of Luis Solarte, which
20 states that:
21

- 22 a) Fortune Growers has not been paid for \$115,266.40 worth of
23 produce that it sold to Southern Citrus, Inc. (See ¶24 of the
24 Declaration of Luis Solarte filed contemporaneously herewith
25 ("Solarte Affidavit").
- 26 b) Promised payment has not been received. (¶25, Solarte Affidavit)
- 27 c) Fortune Growers has been forced to call Southern Citrus numerous
28 times in order to secure payment. (¶¶19, 20, Solarte Affidavit)
- d) Calls made to Southern Citrus by Fortune Growers have been
avoided from June through August. (¶¶21, 23, Solarte Affidavit)
- e) Southern Citrus' PACA license has been terminated. (¶22, Solarte

Affidavit.)

All of this evidence indicates that Southern Citrus is in severe financial jeopardy and the PACA trust assets are being threatened with dissipation. Frio Ice, S.A. v. Sunfruit, Inc., 918 F.2d 154 (11th Cir. 1990).

The giving of notice will only provide Defendants with advance warning that an order may be entered, thereby giving time to Defendants to further dissipate trust assets by paying personal liabilities or non-trust creditors prior to the entry of the order. Thus, a further loss of trust assets would result if there is notice. Because it is all but impossible to recover trust assets once there has been dissipation, H.R. Rep. No. 543, 98th Cong., 2d Sess. 4 (1983), reprinted in 1984 U.S. Code Cong. & Admin. News, 405, 411; J.R. Brooks & Son, Inc. v. Norman's Country Market Inc, 98 B.R. 47, 50 (Bkrtcy. N.D. Fla. 1989), the loss to Plaintiffs and other trust creditors would be irreparable. Continental Fruit v. Thomas J. Gatziolis & Co., 774 F.Supp. 449 (N.D. Ill. 1991); Gullo Produce Co., Inc. v. Jordan Produce Co., Inc, 751 F.Supp. 64 (W.D. Pa. 1990). Furthermore, a prompt hearing will be held on Plaintiff's Motion for Preliminary Injunction, and Defendants can file an immediate application to dissolve the Temporary Restraining Order under Rule 65(b).

Caselaw supports Plaintiff's entitlement to an immediate injunction requiring non-dissipation of trust assets when the Produce supplier is not paid.

1 Frio Ice, S.A. v. Sunfruit, Inc., *supra*, p. 159 ("Upon a showing that the trust is
 2 being dissipated or threatened with dissipation, a district court should require
 3 the PACA debtor to escrow its proceeds from produce sales, identify its
 4 receivables, and inventory its assets."); Dole Fresh Fruit Co. v. United Banana
 5 Co., 821 F.2d 106 (2d Cir. 1987); In re Richmond Produce Co., Inc., 112 B.R. 364,
 6 367 (Bkrtcy. N.D. Cal. 1990).

7
 8
 9 The foundational principle for preliminary relief is that "it is a sound idea
 10 to maintain the status quo ante litem, provided that it can be done without
 11 imposing too excessive an interim burden upon the defendant." Blackwelder
 12 Furniture Company v. Seilig Manufacturing Co., Inc., 550 F.2d 189, 195 (4th Cir.
 13 1979). See also, Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495,
 14 499 (4th Cir.1981).

15
 16
 17 The standard for granting injunctive relief in the 9th Circuit requires the
 18 moving party to show: (1) substantial likelihood of success on the merits; (2)
 19 irreparable harm if an injunction is not granted; (3) the benefits of the injunction
 20 outweigh the harm to defendants; and (4) the issuance of the injunction will not
 21 harm the public interest. Regents of University of California v. ABC, Inc., 747
 22 F.2d 511, 515 (9th Cir. 1984); Los Angeles memorial Coliseum Comm'n v.
 23 National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980). Always, of course,
 24 the public interest should be considered. Blackwelder, 550 F.2d at 196.

There are also a number of unreported cases from the Ninth Circuit supporting the issuance of temporary restraining orders without notice to halt dissipation of trust assets. See Orders issued by United States District Courts in the Ninth Circuit, attached hereto as Composite Exhibit A: Eakin Fruit Company v. Williams AG Brokerage Company, Inc., et al., Case No. 3:07-cv-00144-IEG-RBB (S.D.Ca. January 23, 2007); RBP Nogales, LLC v. San Diego Foods, Inc., et al., Case No. 02-cv-1344-AJB (S.D.Ca. July 10, 2002); Grimmway Enterprises, Inc. v. Premium Fresh Farms, LLC, et. al., Case No. 06-cv-02931-RMW (N.D.Ca. May 5, 2006); Andrew Smith Company v. Naturebest Pre-Cut & Produce, LLC et. al., Case No. 06-cv-405 (N.D.Ca. February 3, 2006); C&R Fresh LLC et al v. Vazquez et al., Case No. 05-cv-1458 (N.D.Ca. April 19, 2005).

The facts in this case show that Plaintiff is entitled to the requested relief.

1. Likelihood of success on the merits

Luis Solarte's Affidavit demonstrates that Plaintiff is owed for non-payment of Produce and has properly preserved its trust claim in the amount of \$115,266.40 as required under the PACA and implementing regulations. Defendants have no defense to these claims under the PACA. Accordingly, Plaintiff will almost certainly prevail in any hearing on the merits of its claim.

2. Irreparable harm

In cases interpreting the rights of PACA creditors, courts in other

1 jurisdictions have recognized that, without injunctive relief, Plaintiffs faced with
2 an insolvent debtor will receive neither the trust assets nor the proceeds of such
3 assets. See Gullo Produce, 751 F.Supp. at 67. This has been found to constitute
4 irreparable harm. Id.; See also Frio Ice, 918 F.2d at 159 ("[t]he legislative history
5 [of the PACA] noted that once the trust is dissipated it is almost impossible for
6 the beneficiary to obtain recovery"). A moving party need only show actual
7 dissipation or the threat of dissipation of the PACA trust in order to obtain
8 injunctive relief and a segregation of the trust proceeds. Frio Ice, 918 F.2d at 159,
9 n. 8.

10
11
12
13 In the instant case, injunctive relief will force Defendants to cease
14 dissipation of the PACA trust, prevent non-trust creditors from obtaining trust
15 assets ahead of the trust's beneficiaries as well as other produce creditors not
16 entitled to remedies under the PACA, and require Defendants to return the trust
17 to a fully-funded level sufficient to satisfy the claims of qualified beneficial
18 interests in full. In short, it will force Defendants to comply with the law.
19 Because it is virtually impossible to recover trust assets once they have been
20 dissipated, the loss to Plaintiff and other trust creditors is irreparable.

21 3. Balancing of harm

22 Defendants cannot be harmed by the issuance of an injunction because the
23 relief Plaintiff seeks is merely to force the Defendants to comply with its pre-
24

1 existing obligations under federal law - that is, to preserve the PACA trust assets
2 for the benefit of PACA beneficiaries and make "full payment promptly" on all
3 Produce related invoices. On the other hand, the risk of harm to Plaintiff is
4 great if Defendants are allowed to further dissipate trust assets. As stated
5 above, numerous courts have recognized the fact that once the PACA trust
6 assets are dissipated, an unpaid trust claimant in Plaintiff's position is extremely
7 unlikely to recover any portion of its beneficial interest in the trust, a result
8 contrary to the express purpose of the statute.
9
10

11 **4. Public interest**
12

13 The strong preference for PACA trust creditors which Congress expressed
14 in the 1984 trust amendments to the PACA clearly demonstrates the public
15 interest at stake in this case. These safeguards were established in order to
16 assure payment to the producers of perishable agricultural products. There can
17 scarcely be a more vital public concern than the economic security of this
18 nation's food supply. This supply and distribution chain consists of the very
19 same growers, producers and distributors, which Congress sought to protect by
20 enacting this legislation. To deny Plaintiff the requested relief would be to
21 erode the protection Congress guaranteed these parties by passing the PACA
22 and the regulations promulgated thereunder. Therefore, the requested
23 injunction is clearly in the public interest.
24
25
26
27

1 The instant claim for relief meets each of these tests, and accordingly,
2 should be granted in all respects.

3 For the foregoing reasons, Plaintiff respectfully submits that its Ex-Parte
4 Motion for Temporary Restraining Order and Motion for Preliminary Injunction
5 be granted.
6

7
8 Respectfully submitted this 26th day of October, 2007.

9 MEUERS LAW FIRM, P.L.

10 By: 

11 Lawrence H. Meuers, Esq.

12 (SBN: 197663)

13 Steven E. Nurenberg, Esq.

14 FL Bar No. 0808431

15 Steven M. De Falco

16 FL Bar No. 0733571

17 5395 Park Central Court

18 Naples, Florida 34109

19 Telephone: (239) 513-9191

20 Facsimile: (239) 513-9677

21 lmeuers@meuerslawfirm.com

22 snurenberg@meuerslawfirm.com

23 sdefalco@meuerslawfirm.com

24 Attorneys for Plaintiff
25
26
27

Exhibit A

FILED

07 JAN 23 PM 4:58

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY

DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

EAKIN FRUIT COMPANY, a Washington
Corporation,

Plaintiff,

vs.

WILLIAMS AG COMMODITIES
BROKERAGE, INC., A California
Corporation; CLINT WILLIAMS, an
individual; and H. WILT WILLIAMS, JR., an
individual,

Defendants.

CASE NO. 07-CV-144 – IEG (RBB)

**TEMPORARY RESTRAINING
ORDER**

Presently before the court is Eakin Fruit Company's ("plaintiff") Ex Parte Motion for Temporary Restraining Order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure. Pursuant to Rule 65(b), a temporary restraining order may be granted without notice to the adverse party only if: (1) it clearly appears from specific facts shown by Declaration or verified complaint that immediate and irreparable injury, loss or damage will result before adverse party can be heard in opposition, and (2) the applicant's attorney certifies the reasons that notice should not be required.

In this case, it appears from the Declaration of Michael R. Riehl, Director of Sales for plaintiff, that plaintiff Eakin Fruit Company is a produce dealer and trust creditor of defendant Williams AG Commodities Brokerage, Inc. ("Williams AG") under Section 5(c) of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §499e(c), and has not been paid for produce in the total amount

1 of \$53,038.75 supplied to Williams AG as required by PACA. The Declaration of Michael R. Riehl
2 and Certification of Counsel reveals that plaintiff believes defendant is in severe financial jeopardy
3 and that PACA trust assets are being dissipated or threatened with dissipation and that defendant is
4 not or may not be in a position to pay creditor's claim. See Frio Ice, S.A. v. Sunfruit, Inc., 918 F.2d
5 154 (11th Cir. 1990); JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75 (2d Cir. 1990). Thus, the
6 relief requested by plaintiff is warranted. On the basis of the pleadings, the Declaration of Michael
7 R. Riehl, and other submissions plaintiff has filed in this matter, it appears plaintiff will suffer
8 immediate and irreparable injury due to Williams AG's dissipation of plaintiff's beneficial interest in
9 the statutory trust created pursuant to 7 U.S.C. §499e(c). In addition, this threatened dissipation will
10 continue in the absence of immediate injunctive relief.

11 If notice is given to Williams AG and the other defendants named in the lawsuit, Clint
12 Williams and H. Wilt Williams, Jr., of the pendency of this motion, trusts assets will be further
13 threatened with dissipation before the motion on preliminary injunction can be heard. As noted in the
14 legislative history of PACA, once dissipation has occurred, recovery of trust assets is nearly
15 impossible. H.R. Rep. No. 543, 98th Cong., 2d Sess. 4 (1983), reprinted in 1984 U.S. Code & Admin.
16 News 405, 411; J.R. Brooks & Son, Inc. v. Norman's Country Market, Inc., 98 B.R. 47 (Bkrtcy. N.D.
17 Fla. 1989). Entry of this Temporary Restraining Order without notice assures retention of the trust
18 assets under the control of this court, which is specifically vested with jurisdiction over the trust.
19 7 U.S.C. §499e(c). In accord with Fed. R. Civ. Pro. 65(b)(2), plaintiff's attorney has certified why
20 notice should not be required.

21 Based on the foregoing reasons and consideration of plaintiff's papers, the court finds that
22 plaintiff and other PACA trust creditors, if any, will suffer immediate irreparable injury in the form
23 of the loss of trust assets. Thus, a Temporary Restraining Order should be issued without notice to the
24 defendants.

25 The court hereby orders that:

- 26 (1) Defendant Williams AG, its member agents, officers, subsidiaries, assigns, banking
27 and financial institutions, and all persons in active concert or participation with
28 Williams AG, including Clint Williams and H. Wilt Williams, are enjoined and

1 restrained from dissipating, paying, transferring, assigning, or selling any and all assets
2 covered by or subject to the trust provisions of PACA without agreement of the
3 plaintiff, or until further order of the court. Under §499e(c)(2) of PACA, the assets
4 subject to this order include all assets of Williams AG unless Williams AG can prove
5 to this court that a particular asset is not derived from perishable agricultural
6 commodities, inventories of food or other products derived from perishable agricultural
7 commodities or receivables or proceeds from the sale of such commodities or products.
8 Provided however, Williams AG may sell perishable agricultural commodities or
9 products derived from perishable agricultural commodities for fair compensation,
10 without right of set-off, on the condition that Williams AG maintains the proceeds of
11 such sale subject to this order.

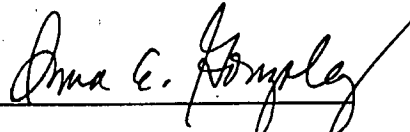
- 12 (2) This Temporary Restraining Order shall be binding upon the parties to this action and
13 all other persons or entities who receive actual notice of this order by personal service
14 or other acceptable means of service.
- 15 (3) The \$53,038.75 in PACA trust assets belonging to plaintiff and in the possession of
16 defendants will serve as plaintiff's security for this injunction as required by Rule 65(c)
17 of the Fed. R. Civ. Pro.
- 18 (4) Plaintiff shall **forthwith** serve defendants with a copy of this order, together with the
19 annexed Declaration of Michael R. Riehl, and Memorandum of Law in Support of Ex-
20 Parte Motion for Temporary Restraining Order, and any other documentation
21 previously filed with the court, in accordance with the Fed. R. Civ. Pro.
- 22 (5) This Temporary Restraining Order is entered this 23rd day of January 2007 at 3:20
23 p.m.
- 24 (6) A hearing on plaintiff's motion for preliminary injunction is set for **February 6, 2007**
25 **at 10:00 a.m. in Courtroom 1** of the Edward J. Schwartz United States District
26 Courthouse, 940 Front St., San Diego CA 92101.
- 27 (7) Defendants' opposition to the plaintiff's motion for preliminary injunction, if any, shall
28 be filed **no later than January 31, 2007** with a courtesy copy to be delivered to

1 chambers on that date.

2 (8) Plaintiff's reply, if any, shall be filed no later than February 2, 2007.

3 IT IS SO ORDERED.

4
5 Dated: 1/23/07

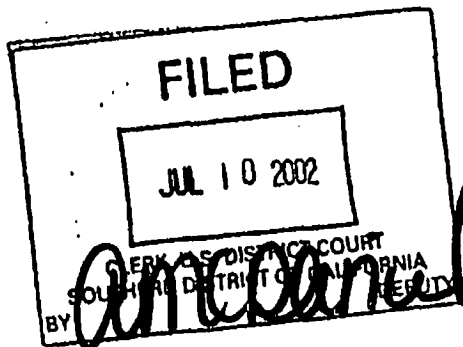
6
7 

8 Hon. Irma E. Gonzalez, Chief Judge
9 United States District Court
10 Southern District of California
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORIGINAL

1 Lawrence H. Meuers (SBN: 197663)
2 MEUERS LAW FIRM, P.L.
3 5395 Park Central Court
4 Naples, FL 34109
5 Tel: (239) 513-9191
6 Fax: (239) 513-9677

7 Attorneys for Plaintiffs



8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 RBP NOGALES, LLC.,

11 Plaintiff,

12 vs.

13 SAN DIEGO FOODS, INC., a
14 corporation and MATT MARTINEZ,
15 an individual,

16 Defendants.
17

Case No. 02-0V 1344 W (AJB)

18 TEMPORARY RESTRAINING
19 ORDER

20 This matter is before the Court upon Plaintiff's Ex-Parte Motion for Temporary
21 Restraining Order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure.
22 Pursuant to Rule 65(b), a temporary restraining order may be granted without notice to
23 the adverse party only if: (1) it clearly appears from specific facts shown by affidavit or
24 verified complaint that immediate and irreparable injury, loss or damage will result
25 before the adverse party can be heard in opposition, and (2) the applicant's attorney
26 certifies the reasons that notice should not be required.
27

28 Temporary Restraining Order

Page 1

4

07/08/2002 10:51:31 FAX 408/2000111 RECEIVED

1 In this case, it clearly appears from the affidavit of Eduardo ("Eddie") Martin
2 Hernandez that Plaintiff RBP Nogales, LLC is a produce dealer and trust creditor of
3 Defendant San Diego Foods, Inc. ("San Diego Foods") under Section 5(c) of the
4 Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §499e(c), and has not been
5 paid for produce in the total amount of \$31,773.15 supplied to said Defendant as
6 required by the PACA. It is also clear from the same affidavit and the certification of
7 counsel that said Defendant is in severe financial jeopardy and the PACA trust assets
8 are being dissipated or threatened with dissipation (Frio Ice, S.A. v. Sunfruit, Inc., 918
9 F.2d 154 (11th Cir. 1990)) and that said Defendant is not or may not be in a position to
10 pay creditor's claim (JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75 (2d Cir.
11 1990)), thereby warranting the relief requested by Plaintiff. On the basis of the
12 pleadings, affidavit and other submissions Plaintiff has filed in this matter, it appears
13 Plaintiff will suffer immediate and irreparable injury due to said Defendant's dissipation
14 of Plaintiff's beneficial interest in the statutory trust created pursuant to 7 U.S.C.
15 §499e(c), and that such dissipation will continue in the absence of injunctive relief.
16 Therefore, the Court is of the opinion that a Temporary Restraining Order should be
17 issued.

18 If notice is given to Defendant of the pendency of this motion, trust assets will be
19 further threatened with dissipation before the motion is heard. As noted in the
20 legislative history of PACA, once dissipation has occurred, recovery of trust assets is all
21 but impossible. H.R. Rep. No. 543, 98th Cong., 2d Sess. 4 (1983), reprinted in 1984
22 U.S. Code & Admin. News 405, 411. J.R. Brooks & Son, Inc. v. Norman's Country

23 Temporary Restraining Order

Page 2

1 Market, Inc., 98 B.R. 47 (Bkrcty. N.D.Fla. 1989). Entry of this Order without notice
 2 assures retention of the trust assets under the control of this Court which is specifically
 3 vested with jurisdiction over the trust. 7 U.S.C. §499e(c)(5). In accord with Rule
 4 65(b)(2), the applicant's attorney has certified why notice should not be required.
 5

6 Based on the foregoing, the Court finds that Plaintiff and other PACA trust
 7 creditors, if any, will suffer immediate irreparable injury in the form of a loss of trust
 8 assets unless this order is granted without notice.
 9

10 Therefore, it is by the United States District Court for the Southern District of
 11 California

12 **ORDERED:**

13 1. Defendant San Diego Foods, Inc. ("San Diego Foods"), its agents,
 14 officers, subsidiaries, assigns, banking and financial institutions, and all persons in
 15 active concert or participation with said Defendant, are enjoined and restrained from
 16 dissipating, paying, transferring, assigning or selling any and all assets covered by or
 17 subject to the trust provisions of the PACA without agreement of RBP Nogales, LLC or
 18 until further order of this Court. Under §499e(c)(2) of PACA, the assets subject to this
 19 order include all of the assets of San Diego Foods unless San Diego Foods can prove to
 20 this Court that a particular asset is not derived from perishable agricultural
 21 commodities, inventories of food or other products derived from perishable agricultural
 22 commodities or receivables or proceeds from the sale of such commodities or products.
 23 Provided however, San Diego Foods may sell perishable agricultural commodities or
 24 products derived from perishable agricultural commodities for fair compensation,
 25
 26
 27
 28

Temporary Restraining Order

Page 3

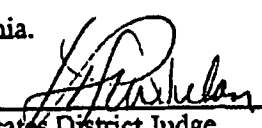
1 without right of set-off, on the condition that San Diego Foods maintains the proceeds
 2 of such sale subject to this Order.

3 2. This Order shall be binding upon the parties to this action and all other
 4 persons or entities who receive actual notice of this Order by personal service or
 5 otherwise.
 6

7 3. The \$31,773.15 in PACA trust assets belonging to Plaintiff and in the
 8 possession of the Defendant will serve as Plaintiffs' security for this injunction as
 9 required by Rule 65(c) of the Federal Rules of Civil Procedure.
 10

11 This Temporary Restraining Order is entered this 10th day of
 12 July, 2002, at 3:00 p.m. A hearing on Plaintiffs' motion for
 13 preliminary injunction is set for the 22nd day of July, 2002 at 10:30
 14 a.m. Plaintiff shall forthwith serve Defendants, or their resident agent, or their
 15 counsel, with a copy of this Order.
 16

17 DONE and ORDERED, this 10th day of July
 18 2002 at San Diego, California.
 19

20 
 21 United States District Judge
 22 Southern District of California
 23
 24
 25
 26
 27
 28

Temporary Restraining Order

Page 4

Case 3:07-cv-02088-JAH Document 5-2 Filed 10/31/2007 Page 1 of 2

E-FILED on 5/5/06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GRIMMWAY ENTERPRISES, INC. d/b/a
GRIMMWAY FARMS,

Plaintiff,

v.

PREMIUM FRESH FARMS, LLC;
SALVADORE PAUL TARANTINO;
EMMITT L. PFOST; PAUL E. DUNHAM;
GREG SWENSON; PDP ASSOCIATES, LLC;
and AG HARVESTING & TECHNOLOGIES,
LLC,

Defendants.

No. C-06-02931 RMW

ORDER GRANTING PLAINTIFF'S MOTION
FOR TEMPORARY RESTRAINING ORDER;
DENYING PLAINTIFF'S MOTION TO
CONSOLIDATE MOTION FOR
PRELIMINARY INJUNCTION WITH TRIAL

[Re Docket Nos. 4, 7]

TO DEFENDANTS PREMIUM FRESH FARMS, LLC; SALVADORE PAUL TARANTINO;
EMMITT L. PFOST; PAUL E. DUNHAM; GREG SWENSON; PDP ASSOCIATES, LLC; AG
HARVESTING & TECHNOLOGIES, LLC, AND THEIR ATTORNEYS OF RECORD:

TEMPORARY RESTRAINING ORDER

This matter is before the court upon *Ex Parte* Motion for Temporary Restraining Order by
Grimmway Enterprises, Inc. d/b/a Grimmway Farms ("Plaintiff") pursuant to Federal Rule of Civil
Procedure 65(b). Under Rule 65(b), a temporary restraining order may be granted without notice to
the adverse party only if: (1) it clearly appears from specific facts shown by affidavit or verified
complaint that immediate and irreparable injury, loss, or damage will result before the adverse party

ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER
C-06-02931 RMW
SPT

Case 3:07-cv-02088-JAH Document 5-2 Filed 10/31/2007 Page 21 of 32

1 can be heard in opposition, and (2) the applicant's attorney certifies the reasons that notice should
2 not be required.

3 It appears to the court (1) that defendants Premium Fresh Farms, LLC; Salvatore Paul
4 Tarantino; Emmitt L. Pfost; Paul E. Dunham; Greg Swenson; PDP Associates, LLC; and AG
5 Harvesting & Technologies, LLC ("Defendants") have engaged in transactions requiring the
6 establishment of a statutory trust to the benefit of Plaintiff pursuant to the Perishable Agricultural
7 Commodities Act ("PACA"), 7 U.S.C. § 499e; (2) that Defendants are presently engaged in
8 dissipating the assets it is required to keep in trust under PACA; (3) that they will continue to do so
9 unless restrained by order of this court; (4) that notice of this TRO would cause further dissipation in
10 advance of a court order; and (5) that immediate and irreparable injury, loss, and damage will result
11 to Plaintiff if Defendants are not restrained from distributing claimed proceeds of the PACA trust
12 pending a hearing and determination of Plaintiff's motion for preliminary injunction. Accordingly,

13 IT IS HEREBY ORDERED:

- 14 1. That Defendants, their counsel, agents, officers, assigns, or representatives be and hereby are
15 restrained and enjoined pending the hearing and determination of Plaintiff's motion for
16 preliminary injunction from:
- 17 a. Removing, withdrawing, transferring, assigning, or selling to any other person
18 or entity, the proceeds from the sales of any or all existing or future
19 inventories of food or other products derived from perishable agricultural
20 commodities as defined in PACA, 7 U.S.C. § 499a(b), or receipts of payment
21 for such agricultural commodities sold prior to the date of this order,
22 provided, however that Defendants may sell perishable agricultural
23 commodities or products derived from perishable agricultural commodities for
24 fair compensation without right of set-off, on the condition that Fresh Farms
25 maintains the proceeds of such sale subject to this order.
 - 26 b. Taking any other action which causes dissipation of Plaintiff's beneficiary
27 interest in PACA trust assets; or
 - 28 c. Taking any action that violates the provisions of 7 U.S.C. § 499b(4).

Case 3:07-cv-02088-JAH-CAB Document 5-2 Filed 10/31/2007 Page 22 of 32

- 1 2. This Order shall be binding upon the parties to this action and all other persons or entities
2 who receive actual notice of this Order by personal service or otherwise.
- 3 3. The \$101,074.84 in PACA trust assets belonging to Plaintiff and in the possession of
4 Defendants will serve as Plaintiff's security for this injunction as required by Federal Rule of
5 Civil Procedure 65(c).
- 6 4. Plaintiff shall forthwith serve Defendants, or their resident agent, or their counsel, with a
7 copy of this Order.

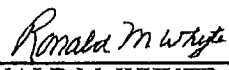
8 **ORDER**

9 Plaintiff's motion to consolidate the trial on the merits with the hearing on preliminary
10 injunction is denied without prejudice. Although Plaintiff may be correct that consolidation would
11 result in considerable economy, given that Plaintiff's complaint, filed concurrently with its *ex parte*
12 application for temporary restraining order on May 1, 2006, has not been served upon Defendants,
13 Defendants will have had no notice of trial and could be unfairly prejudiced.

14 **ORDER TO SHOW CAUSE**

15 IT IS FURTHER ORDERED that Plaintiff shall serve the complaint, motion for preliminary
16 injunction, and any supporting documentation previously filed with the court on Defendants within two
17 (2) days; that Defendants shall file an opposition brief to Plaintiff's motion no later than Wednesday,
18 May 10, 2006; that Plaintiff shall file a reply thereto no later than Friday, May 12, 2006; and that, in
19 consideration of the four weekend days following entry of this Order, the Order shall be extended for
20 good cause shown through May 19, 2006 and Defendants shall appear before the Honorable Ronald M.
21 Whyte in courtroom 6, 4th floor, United States District Courthouse, located at 280 South First Street,
22 San Jose, CA 95113, on Friday, May 19, 2006, at 9:00 a.m., or as soon thereafter as this matter may be
23 heard, to show cause why they should not be enjoined and restrained from distributing PACA trust
24 assets as set forth in the temporary restraining order pending the final hearing and determination of this
25 action.

26
27 ISSUED ON: 5/5/06 at 2:00 p.m.



RONALD M. WHYTE
United States District Judge

28
ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER
C-06-02931 RMW
SPT

~~Case 3:07-cv-02088-JAH-CAB Document 5-2 Filed 10/31/2007 Page 23 of 32~~

1 Notice of this document has been electronically sent to:

2 **Counsel for Plaintiff:**

3 Lawrence Henry Meuers lmeuers@meuerslawfirm.com

4 **Counsel for Defendants:**

5 No appearance

6
7 Counsel are responsible for distributing copies of this document to co-counsel that have not
8 registered for e-filing under the court's CM/ECF program.

9
10 Dated: 5/5/06

SPT
Chambers of Judge Whyte

Case 3:07-cv-02088-JAH Document 5-2 Filed 10/31/2007 Page 1 of 1

1 Paul W. Moncrief, Esq. #204239
 2 LOMBARDO & GILLES, PC
 3 318 Cayuga Street
 4 Salinas, California 93901
 5 Telephone: 831.754.2444
 6 Facsimile: 831.754.2011

7 Attorneys for Plaintiff,
 8 Andrew Smith Company

RE

E-Filing

JAN 23 2006

IN THE UNITED STATES DISTRICT COURT

9 FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION
 10 ANDREW SMITH COMPANY, No. 006-00405

11 Plaintiff,
 12 v.
 13 NATUREBEST PRE CUT & PRODUCE, LLC,
 14 MAXIMILIANO MACHADO, and DOES 1-20
 15 inclusive
 16 Defendants.

17 [PROPOSED] TEMPORARY
 18 RESTRAINING ORDER AND
 19 ORDER TO SHOW CAUSE RE:
 20 PRELIMINARY INJUNCTION AND
 21 PROPOSED PRELIMINARY
 22 INJUNCTION

23 Upon review of the Complaint of Plaintiff ANDREW SMITH COMPANY on file in
 24 the above-captioned action, and the declarations, exhibits and Memorandum of Points and
 25 Authorities in support of Plaintiff's Motion for a Temporary Restraining Order and/or
 26 Preliminary Injunction submitted therewith, and any and all documents provided by
 27 Defendants NATUREBEST PRE CUT & PRODUCE, LLC, MAXIMILIANO MACHADO, and
 28 DOES 1-20 inclusive (hereinafter referred to collectively as "Defendants") in opposition
 thereto, and it appearing to the satisfaction of the Court that this is a proper case for granting
 a Temporary Restraining Order and Order to Show Cause,

IT IS HEREBY ORDERED that:

1. Defendants appear in Courtroom of the U.S. District Court for the Northern
 District of California, San Jose Division, 280 S, 1st Street, Rm. 2112, San Jose, California 95113

Case 3:07-cv-02088-JAH Document 5-2 Filed 10/31/2007 Page 25 of 32

1 on FEB. 27, 2006, at 9:00 a.m., or as soon thereafter as the matter may be
2 heard, then and there to show cause, if any they have, why they, their agents, bankers,
3 subsidiaries, successors, assignees, principals, employees, attorneys, and representatives
4 should not be restrained and preliminarily enjoined during the pendency of this action,
5 pursuant to Rule 65 of the Federal Rules of Civil Procedure, from engaging in, committing,
6 or performing directly and indirectly, any and all of the following acts:

7 a. Removing, withdrawing, transferring, assigning or selling to any other
8 person or entity, the proceeds from the sales of any or all existing or future inventories of
9 food or other products derived from perishable agricultural commodities as defined in
10 the Perishable Agricultural Commodities Act ("PACA" [7 U.S.C. §499e et seq.]), and/or
11 receipts of payment for products sold prior to the date of this order and/or otherwise
12 disposing of assets, books or funds;

13 b. Taking any other action whatsoever which causes, has the effect of
14 causing, or which otherwise dissipates Plaintiff's beneficiary interest in PACA trust
15 assets;

16 c. Taking any other action whatsoever which violates 7 U.S.C. §499e(c) (1)
17 through (4), inclusive, and 7 U.S.C. §499b(4).

18 2. Defendants, their owners, officers, directors, bankers, agents, subsidiaries,
19 successors, assignees, principals, assignors, attorneys and persons acting in concert with them,
20 appear at the same time and place to show cause, if any they have, why they should not be
21 commanded by order of this Court and required to distribute PACA trust assets in the amount of at
22 least \$50,473.85, which includes \$41,521.13, the cumulative amount of the PACA Trust
23 principal owing to Plaintiff, plus \$2,415.22 in finance charges per agreement accrued from the
24 dates of default for each transactions through December 21, 2005 and attorneys' fees in the
25 amount of \$6,387.50 and costs of \$150.00.

26 3. Pending the hearing and determination of the foregoing Order to Show Cause,
27 Defendants, their agents, bankers, subsidiaries, successors, assignees, principals, attorneys, and
28 persons acting in concert with them shall be and hereby are prevented from transferring,

Case 3:07-cv-02088-JAH Document 5-2 Filed 10/31/2007 Page 26 of 32

1 withdrawing or in any other manner removing PACA trust assets, including funds on deposit in
2 banking accounts held by or on behalf of Defendants, from Defendants' banking accounts,
3 including but not limited to Account Number 750232714 at Whitney National Bank, 12600
4 Memorial Drive, Houston, Texas 77024, or any other subsequently identified banking accounts
5 standing in the names of or for the benefit of Defendants, or any of them.

6 4. Pending the hearing and determination of the foregoing Order to Show Cause,
7 and continuing thereafter, Defendants and their counsel, agents, or representatives, shall be
8 preliminarily enjoined from engaging in, committing, or performing directly and indirectly, any
9 and all of the following:

10 a. Removing, withdrawing, transferring, assigning or selling to any other
11 person or entity, the proceeds from the sales of any or all existing or future inventories of
12 food or other products derived from perishable agricultural commodities, and/or receipts of
13 payment for products or crops sold prior to the date of this order and/or otherwise disposing
14 of assets, books or funds;

15 b. Taking any other action whatsoever which causes, has the effect of
16 causing, or which otherwise dissipates the PACA trust assets;

17 c. Taking any other action whatsoever which violates 7 U.S.C.
18 §499e(c)(1) through (4), inclusive, and 7 U.S.C. §499b(4).

19 5. In the event Defendants lack sufficient funds to promptly deposit the sums
20 described above, Defendants shall be and hereby are required and ordered to:

21 a. Immediately account to the Court and Plaintiff for all assets of the
22 PACA trust from commencement of Defendants' business through the date of this
23 Order.

24 b. Immediately assign Defendants' inventory of perishable agricultural
25 commodities and produce related receivables to Plaintiff for sale and collection until
26 Plaintiff's PACA trust claims are fully paid, and deposit and/or deliver complete
27 accounts, records, and information of all of said receivables to Plaintiff's counsel
28 without charge to the trust, and subject to Plaintiff's counsel making a weekly

Case 3:07-cv-02088-JAH Document 5-2 Filed 10/31/2007 Page 2 of 2

1 accounting for all receivables received or collected by Plaintiff's counsel in that
2 regard. Plaintiff's counsel shall act as trustee in connection with its duties of
3 collection of the accounts receivable and shall deposit any cash assets of the trust
4 which are collected under this order in a trust account.

5 c. Endorse any checks made, endorsed or paid, to Defendants which are trust
6 assets and which are in their possession or obtainable by Defendants at the time of the
7 entry of this Order, or which Defendants obtain or which become obtainable by
8 Defendants after the entry of this Order, including but not limited to checks representing
9 payment for sales of inventory, and shall deliver such checks within 48 hours of
10 Defendants' receipt of them to Plaintiff's counsel as set forth above. Likewise,
11 Defendants shall deliver any cash assets of the PACA trust which are in its possession or are
12 obtainable by Defendants at the time of the entry of this order, or which Defendants obtain or
13 which become obtainable by Defendants after entry of this Order, within 48 hours of
14 Defendants receipt of them to Plaintiff's counsel.

15 d. File weekly with this Court satisfactory evidence of compliance with the
16 terms of this Order.

17 7. Pending the hearing and determination of the foregoing Order to Show Cause,
18 and continuing thereafter, Plaintiff and its counsel, agents, or representatives, shall have full
19 and complete and continuing access to all of Defendants' books and records, which shall include
20 but not necessarily be limited to, Defendants' accounts receivable and payable ledgers, invoices,
21 ledgers, computer runs, bank statements and canceled checks, relating to Defendants' business
22 and personal financial status from commencement of Defendants' business activities forward, for
23 the purpose of verifying Defendants' accountings required by this Order and for enforcement of
24 this Order. Defendants shall, upon 48 hours notice by Plaintiff's counsel, allow inspection and
25 copying of the books and records of said Defendants by Plaintiff or its representatives at
26 Defendants' place of business,

27 8. Pending the hearing and determination of the foregoing Order to Show Cause,
28 and continuing thereafter, Plaintiff shall be entitled to depose, under oath, at reasonable times and

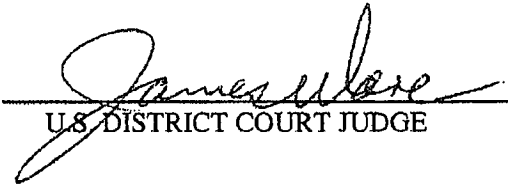
Case 3:07-cv-02088-JAH Document 5-2 Filed 10/31/2007 Page 28 of 32

1 places, upon at least 48 hours notice, Defendants and/or Defendants' other principals, owners,
2 directors, officers, shareholders, employees, agents and accountants concerning any matter
3 pertaining to any accounting due pursuant to this Order, any books or records which Plaintiff is
4 entitled to inspect under this Order, the trust assets or any of Defendants' business assets,
5 and/or Defendants business practices, procedures or operations from commencement of
6 Defendants' business activities.

7 9. Plaintiff shall serve Defendants with copies of this Order and all pleadings and
8 other papers in support of the Order on or before Defendants shall file an Opposition, if any, to
9 the Order to Show Cause on or before 5:00 p.m. on FEB. 9, 2006 and shall personally
10 serve Plaintiff's counsel with a copy of said opposition by the same deadline. Plaintiff shall file
11 and serve on Defendant a Reply to Defendants' Opposition on or before 5:00 p.m. on
12 FEB. 16, 2006

13 10. No bond shall be required to be posted by Plaintiff before the Temporary
14 Restraining Order is effective.

15 DATED: February 3, 2006

16
17
18 
19 U.S. DISTRICT COURT JUDGE
20
21
22
23
24
25
26
27
28

Case 3:07-cv-02088-RMW Document 13 Filed 02/19/2005 Page 1 of 2

E-FILED on 9/19/05

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

C&R FRESH LLC; HENRY AVOCADO
CORPORATION d/b/a CUSTOM RIPE
AVOCADO COMPANY; and ONEONTA
TRADING CORP,

Plaintiff,

v.

JAVIER VASQUEZ d/b/a LA ESPERANZA
PRODUCE; and DAVID B. VAZQUEZ,

Defendants.

No. C-05-01458 RMW

ORDER GRANTING PLAINTIFFS' MOTION
FOR TEMPORARY RESTRAINING ORDER;
DENYING PLAINTIFF'S MOTION TO
CONSOLIDATE MOTION FOR
PRELIMINARY INJUNCTION WITH TRIAL

[Re Docket No. 2, 11]

TO DEFENDANTS JAVIER VASQUEZ d/b/a LA ESPERANZA PRODUCE, DAVID B. VAZQUEZ,
AND THEIR ATTORNEYS OF RECORD:

TEMPORARY RESTRAINING ORDER

It appears to the court (1) that defendants Javier Vasquez d/b/a La Esperanza Produce and David B. Vazquez, ("Defendants") have engaged in transactions requiring the establishment of a statutory trust to the benefit of C&R Fresh LLC, Henry Avocado Corporation d/b/a Custom Ripe Avocado Company, and Oneonta Trading Corp., ("Plaintiffs") pursuant to the Perishable Agricultural Act ("PACA"), 7 U.S.C. § 499e; (2) that Defendants are presently engaged in dissipating the assets they are required to keep in trust under PACA; (3) that they will continue to do so unless restrained by order of this court; (4) that notice of this TRO would cause further dissipation in advance of a court order; and (5) that immediate and irreparable injury, loss,

ORDER GRANTING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER—C-05-01458 RMW
MAG

Case 3:07-cv-02088-JAH Document 5-2 Filed 10/31/2007 Page 30 of 32

1 and damage will result to Plaintiffs if Defendants are not restrained from distributing claimed proceeds of the
2 PACA trust pending a hearing and determination of Plaintiffs' motion for preliminary injunction. Accordingly,

3 IT IS HEREBY ORDERED that Defendants, their counsel, agents, officers, assigns, or representatives
4 be and hereby are restrained and enjoined pending the hearing and determination of Plaintiffs' motion for
5 preliminary injunction from:

- 6 1. Removing, withdrawing, transferring, assigning, or selling to any other person or entity, the proceeds
7 from the sales of any or all existing or future inventories of food or other products derived from
8 perishable agricultural commodities as defined in PACA, 7 U.S.C. § 499a(b), or receipts of payment
9 for such agricultural commodities sold prior to the date of this order, provided, however that
10 Defendants may sell perishable agricultural commodities or products derived from perishable
11 agricultural commodities for fair compensation without right of set-off, on the condition that Defendants
12 maintain the proceeds of such sale subject to this order.
- 13 2. Taking any other action which causes dissipation of Plaintiffs' beneficiary interest in PACA trust assets;
14 or
- 15 3. Taking any action that violates the provisions of 7 U.S.C. § 499b(4).

16 ORDER

17 Plaintiffs' motion to consolidate the trial on the merits with the hearing on preliminary injunction is denied
18 without prejudice. Although Plaintiffs may be correct that consolidation would result in considerable economy,
19 given that Defendants will have had no notice of trial until the issuance of this order, Defendants could be
20 unfairly prejudiced.

21 ORDER TO SHOW CAUSE

22 IT IS FURTHER ORDERED that Plaintiffs shall serve the complaint, motion for preliminary injunction,
23 and any supporting documentation previously filed with the court on Defendants within two (2) days; that
24 Defendants shall file an opposition brief to Plaintiffs' motion no later than Friday, April 22, 2005; that Plaintiffs
25 shall file a reply thereto no later than Tuesday, April 26, 2005; and that Defendants shall appear before the
26 Honorable Ronald M. Whyte in courtroom 6, 4th floor, United States District Courthouse, located at 280
27 South First Street, San Jose, CA 95113, on Friday, April 29, 2005, at 9:00 a.m., or as soon thereafter as this
28 matter may be heard, to show cause why they should not be enjoined and restrained from distributing PACA

~~Case 3:07-cv-02088-RMW Document 12 Filed 10/31/2007 Page 31 of 32~~

1 trust assets as set forth in the temporary restraining order pending the final hearing and determination of this
2 action.

3
4
5 ISSUED ON: 4/19/05 at 4:05 p.m. /s/ Ronald M. Whyte
6 RONALD M. WHYTE
7 United States District Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Case 3:07-cv-02088-JAH Document 5-2 Filed 10/31/2007 Page 4 of 4

1 Notice of this document has been electronically sent to:

2 Counsel for Plaintiff:

3 Lawrence Henry Meuers

lmeuers@meuerslawfirm.com

4
5 Counsel for Defendants:

6 No appearance

7 Counsel are responsible for distributing copies of this document to co-counsel that have not registered for
8 e-filing under the court's CM/ECF program.
9

10 Dated:

4/19/05

/s/ MAG

Chambers of Judge Whyte